

Michael Morrell/Cass Sunstein/Richard Clarke/Peter Swire/Geoffrey Stone

Dear sirs:

I appreciate the opportunity to comment upon how, “in light of advancements in communications technologies, the United States can employ its technical collection capabilities in a manner that optimally protects our national security and advances our foreign policy while respecting our commitment to privacy and civil liberties, recognizing our need to maintain the public trust, and reducing the risk of unauthorized disclosure.”

I would first like to say that it goes without question that the government has need to be well informed about a variety of matters, nationally as well as internationally, some information about which of necessity must be secretly acquired. And employing advanced technology is of course necessary and appropriate.

And of course, there is an obvious need for government authority to maintain secrets in some cases; tactics and strategies for the conduct of war, as well as troop size and locations, for example. But laws and how the authority interprets law cannot legitimately be kept secret from The People in a democratic republic. Such operative conduct is intrinsically authoritarian.

Furthermore, use of certain technological methods makes no sense if 1) it fails to effectively protect our national security, 2) it fails to positively advance our foreign policy, 3) it fails to faithfully operate with sincere respect for the Constitution, and 4) it succeeds only in fostering an increasing public distrust of the government, is wasteful, inefficient, or fraudulent. In such circumstances, unauthorized disclosure is a public service which deserves reward.

Only proper and responsible methodologies deserve protection against unauthorized disclosure: those which do, in fact, serve the genuine interests of national security (and claims of which are not used to guard against mere political or operational embarrassment or abuse instead), which do positively advance our foreign relations, which do sincerely follow the guiding principles of the Constitution, and which do not torture dictionary meaning to accomplish these goals.

Unfortunately, the methods of dragnet collection and surveillance of private citizen information, in its various forms, undertaken without particularized warrant as clearly specified by the 4th Amendment, but which nevertheless are utilized by the NSA and agencies with which such data is shared, fails in every respect to meet the standard of “proper and responsible.” And such programs only serve to negatively impact upon national security, foreign policy, civil liberties and public trust.

The government’s dragnet “data collection” programs function in a manner equivalent to Orwell’s omnipresent “1984” telescreens, employed in service to Kafka’s “The Trial,” to prosecute future crimes and enhance the wealth of extravagantly paid government contractors, as in Spielberg’s “Minority Report.”

These dragnet programs fail in accomplishing their declared goals for a number of specific reasons.

1) The operative premise of “pattern” recognition of “terrorist related activity” is simply bogus. The concept is equivalent to racial profiling of criminal activity, and at best describes a lottery approach to law enforcement. The odds are enormous against accomplishing stated program goals.

The basic idea is easy to understand, which perhaps explains its appeal: using a virtual global dragnet to discover patterns of behavior that suggest potential crime might be used to capture bad guys before they do harm. Unfortunately, that premise is fundamentally flawed. Such “patterns” may be discerned in the same way that people see portraits of Jesus in burnt toast or dirty windows.

To be sure, the FBI labeled author William T. Vollman as a Unabomber suspect, merely because of

a story he published; as he describes it, the case against him “relied on literary criticism.” The House Un-American Activities Committee criminalized the mere suspicion of insufficiently orthodox political expression, never mind the First Amendment, and persecuted film makers - directors, radio commentators, actors and screenwriters - for allegedly influencing the Hollywood motion picture industry to incorporate communist propaganda in films, all without ever demonstrating any such propaganda even existed outside the lynch-mob minds of accusers.

Indeed, the meaning and significance assigned to any given supposed “pattern” is entirely dependent upon analyst perception and bias, regardless of the actual intent of a suspect. An illustration of this phenomenon is the example of the Supreme Court case in *NEA v Finley*, which effectively declared that Rorschach is to blame for what people choose to see in blots of ink. In that case, rather than take responsibility for the product manufactured in their own brains, art critics won the ability to blame artists for that creation instead.

And so the character of a “pattern” is therefore determined not by the author of the material, but by a reviewer - a critic - instead. A case study exposes the intrinsic flaw: When Disney Home Video released “The Little Mermaid” some years ago, the package cover art featured the cartoon's characters, with a small (2”) high golden-spired castle in the background. Disney was deluged with thousands of phone calls, complaints aroused by the reaction of one solitary woman in Mesa, Arizona (in concert with the drooling Pavlovian attention of the so-called “news media”), who upon initially seeing the package discerned in the castle “subliminal phallic symbolism, intentionally designed to subvert the minds of children.” The self-evident falsity of the charge was totally irrelevant. Never mind that it was a Disney cartoon, the most harmless of all inoffensive images; the owner of the illustration studio that created the art was a devout Mormon, and the illustrator who did the painting was a Baptist Sunday School teacher. These people suffered monumental embarrassment, and had to go to great pains to explain to their church memberships that the charge against them was totally false. What is more, they had their financial livelihoods threatened when Disney management - whose art direction staff had previously hired the studio with regularity - reacted by swearing never to employ them again. All because a critic “identified” a “suspicious pattern.”

A more directly related example is provided by General Keith Alexander, Commander of the U.S. Cyber Command. Foreign Policy magazine reports, “When he ran INSCOM... Alexander was fond of building charts that showed how a suspected terrorist was connected to a much broader network of people via his communications or the contacts in his phone or email account.” His charts had diagrams illustrating direct connection to multiple individuals, but upon review by skeptics, the only thing demonstrated was that many people are “connected” to pizza shops.

Oblivious to the rather self-evident problem with such linkage initially, my understanding is that General Alexander has now concluded that pizza joints don’t necessarily constitute valid terrorist “connection” identification, and presumably has stripped communications with pizza parlors from the analysts’ category of “high volume identifiers.” However, as Marcy Wheeler has observed, Gerry’s Italian Kitchen - a pizza joint - was, in fact, directly related to the Boston bombing by the Tsarnaev brothers. The point being that there is simply no particularized relevant association between an ostensible “pattern” divined by dragnet surveillance analysis and any specific criminal misconduct, other than that which may be demonstrated by odds with accuracy roughly equivalent to winning the Powerball lottery. Or from interpreting a Rorschach ink blot.

The core problem with the idea of pattern searches is that identification of such patterns automatically presumes guilt by definition of the search purpose from the outset. When you’re a hammer everything looks like a nail. In other words, it’s “presume guilt first, then prove innocence.” There is no accommodation for irony, humor, criticism or other entirely innocent explanation, and therefore requires proof of a negative to establish suspect innocence. As Freud ostensibly observed, sometimes a cigar is just a cigar. Alas, too many law enforcement analysts -

judging by the nation's history for decades - simply don't have the imaginations to differentiate. They aren't bad people, they're just human, with fallible literal minds, and they operate with preconceptions. It happens in all walks of life.

To underscore the point, I herewith offer a challenge to you, to assess the validity of pattern "recognition." This test consists of a descriptive phrase, and the preconceived assumptions potentially associated with it. And a return on the query is provided for your conclusion.

For ease of comprehension, this demonstration employs a question of obscenity in the realm of art/photography - a subject of considerable public controversy in times past. In this case, consider an image's subject matter, which may be accurately described as having a primary focus on a naked child's genitals and the act of urination. The question is, must such an image, by default of its textual description, be considered axiomatically obscene? Or is it possible that such a depiction could possibly be totally innocent, or even amusingly charming? After answering, please take a look at the accompanying images on the last page of this correspondence, and judge for yourself whether analysis of a "pattern" description likely reveals much more about an analyst's preconceptions than whatever it is that's being evaluated

Alternatively, however, for the sake of argument, let's say the entire foregoing is altogether wrong, the NSA methods are, in fact, demonstrably effective and successful. Which would then mean that the NSA has thereby discerned a great many - if not all - of the patterns of terrorist related identifiers that such a potent program might detect. According to congressional testimony, a solitary case over the several years during which the programs have been in operation (Basaaly Moalin, who sent \$8500 to his home village in Somalia, prosecuted for supporting a terrorist organization), has been identified as attributable exclusively to the data mining surveillance, thus justifying the warrantless spying on every American citizen.

So there are then only two possible conclusions: 1) either there have been almost no potential terrorist threats whatsoever to be identified these many years from the massive unwarranted surveillance, which rather puts its usefulness in some doubt, or 2) the program would have difficulty finding water if it fell out of a boat.

2) Human beings are fallible. Even in the best of circumstances, mistakes - innocent mistakes - are commonly made, yet they still have a serious negative impact on those who suffer as a consequence. But beyond mere innocence, aggressive self-righteousness is a much too common trait.

In the movie "A Few Good Men," Jack Nicholson portrayed a marine commander, who believed his job was to protect American citizens. The Colonel Nathan Jessup character infamously declared, "I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide, and then questions the manner in which I provide it! I would rather you just said "thank you", and went on your way." This is a man who sincerely believed that his position of authority and responsibility allowed him to adopt an attitude of smug self-appointed superiority, and a disdain for the Constitution, which he believed interfered with his job as he saw it.

I respect the desire of law enforcement authorities in general, and the NSA in particular, to get the bad guys. However, the road to hell is paved with good intentions. Law enforcement, by definition, is generally assumed to be a well-intentioned enterprise. However, unfortunately, there appears to be a bald and purposeful disregard by the highest government authorities for the 4th Amendment, because it is apparently seen by those in position of power to interfere with the good intentions of their law enforcement priorities.

And these government officials enjoy enormous power and authority which just begs for abuse, conveniently concealed by secrecy. A variety of abuses have been revealed. Indeed, the NSA has itself admitted abuses - "self-reported" (as if those were the only possible instances) and categorized with the acronym LOVEINT, for one example. The FISC has released opinions describing a number of abuses in the past.

Worse, however, is that the nation's history documents a long list of well-intended government authorities who have purposely abused their power, for ideological reasons. So when President Obama says that the public should just trust "the professionals," he essentially means "professionals" which includes the likes of Oliver North and Richard Secord and John Poindexter and Bob Haldeman and John Ehrlichman and G Gordon Liddy, and Scooter Libby, and James Jesus Angleton. These people all considered themselves patriots, doing what they believed to be the "right thing," and that their means were justified by their ends. They didn't care that they operated illegally and unconstitutionally, because they had appointed themselves and their righteousness above the law.

It matters not that President Obama may have no personal desire to abuse the programs, because without necessary rectification the programs will continue after he has left office. In the wake of demonstrated abuses by other Presidents before him, it is abundantly self-evident that no President can be trusted with the power to secretly spy on American citizens, without warrant and probable cause.

When Richard Nixon told David Frost that "when the president does it, that means that it is not illegal," most sentient beings recognized that kind of thinking as antidemocratic authoritarianism. But now that reasoning has become Standard Operating Procedure by Presidents of both political parties.

Alas, our nation has had a long and awful history of government witch hunts, going literally back to the time of Salem, all perpetrated in the guise of "protecting" the populace: The Alien and Sedition Acts, The Comstock Act, the Red Scare of the 20s, the internment of Japanese-Americans, the Red Scare McCarthyism in the 50s, the HUAC, FBI spying on Martin Luther King, students at Ohio State massacred by the National Guard because they protested against a stupid war, and COINTELPRO. The NSA itself, under leadership of DCI Bill Casey, has a documented history of spying on members of Congress and using the information to try and extort for partisan purpose.

Still today, certain members of Congress, as well as state governments, evince a virtual hysteria and promote laws against totally innocent immigrants, especially from the Middle East and Mexico. And just a short time ago, it was revealed that President Obama has instituted the "Insider Threat Program" about which the McClatchy report reads like a description of Orwell's "1984" Thought Police.

Vice President Cheney, who once argued his office was not subject to Article II of the Constitution, insta-declassified the name and ordered the exposure of a covert CIA operative for purposes of political revenge. Ronald Reagan baldly violated the Constitution, by conducting war operations in Nicaragua in direct contravention of legislation passed by Congress and signed by Reagan himself. He escaped criminal prosecution only because he suffered from Alzheimer's. And Richard Nixon - who perpetrated a laundry list of abuses - eluded prosecution for his crimes while in office only because of a convenient pardon (which merely established a precedent for the Executive Branch to issue Get-Out-of-Jail-Free card pardons, such as were given to indicted and convicted perpetrators of the Iran/contra crimes. The entire trial and conviction of Scooter Libby was mocked by the immediate commutation he received.)

Plus, there was Joe McCarthy, and Roy Cohn, and J. Edgar Hoover, and Kenneth Starr, who, despite providing no actual evidence to support their contentions, still made sweeping allegations of

criminal activity, and pursued devastating persecution of those they falsely charged. The CIA recruited the Nazi spy organization of Reinhard Gehlen, after W.W.II, to conduct spying for the U.S. government. Yet supporters of the NSA/FBI spying apparatus all insult the citizenry by saying we should just trust them. As if their blatant void in trustworthiness - for which their own misconduct over decades is to blame - isn't as obvious as the fabled Emperor's New Clothes.

As recently as Keith Alexander's visit to Congress to lobby against the Amash Amendment, Alexander effectively admitted that the NSA has files on current members; when asked if they could have copies of their own files, he refused. He didn't say that they don't exist, he said "No" they couldn't have copies. Yet the NSA gives away raw sigint data to the Israeli government, controlled by a non-legally binding document. It directs the Israelis to immediately destroy any data authored by US government authorities; so, clearly, the NSA does indeed collect such data. And then, merely hoping for the best that it is not misused, delivers such data to other governments. But not to members of Congress.

Director of National Intelligence, James Clapper, admitted he had lied in congressional testimony (he said he gave a "least untruthful" answer to a question posed by Senator Wyden). And Intelligence Committee Chair Diane Feinstein essentially laughed it off. The Director in the previous administration, Michael Hayden, actually claimed that "probable cause" is not in the 4th Amendment. The attitudes on display in these cases severely undermine trust in government authority.

I have no doubt that the NSA and DoD and FBI all employ agents who are sincerely motivated to do what they believe is "right." I have confidence that President Obama is sincerely well intended. But so too was George Bush, when he lied about WMD in Iraq as justification for war. So was the CIA when it initiated the Bay of Pigs invasion, and the overthrow of the democratically elected Iranian government of Mohammed Mosaddeq. So was Jefferson Davis. So was George Custer. Stupidity bred by self-righteousness is a hallmark of American über alles adventurism. The national security apparatus of the government has repeatedly sullied the good name of the United States, simply because it has the veil of secrecy to hide behind, and so manages to avoid political accountability. However, the behavior is commonly not secret from enemy targets, rather it is only kept secret from the citizens of the United States.

There is no transparent mechanism in place to prevent abuses. And it appears designed that way on purpose. The purview of the FISA Court is severely constrained, and does not allow for any genuine judicial review of government behavior, such as in litigation whereby the government is actually compelled to defend its conduct in an adversarial procedure. Members of Congress are rarely expert at anything, and often their technically knowledgeable staffs are not allowed to assist in oversight review. The program secrecy is used as a foil to prevent any genuine effective oversight. As Dana Carvey's Church Lady often noted, "How convenient!"

3) Nothing more quickly engenders distrust in government authority than the blatantly insulting and cynical abuse of dictionary meaning. "Enhanced interrogation techniques" as a term employed to justify torture remains a monumentally sneering offense to the public's intelligence. Moreover, it has unquestionably diminished respect for the United States in the eyes of the rest of the world.

By the same token, the NSA tortures language to justify warrantless surveillance of American citizens, by claiming such citizens are not "targeted," rather their data is just "incidentally collected" and so therefore it's okay to search since it just happens to be archived. And the cynicism is compounded by the claim that "national security interest" precludes revealing how such language has been so egregiously misemployed.

It is totally unrealistic for the Executive Branch to expect the public to trust a government authority which persists in denying that it collects private information about US citizens without warrant, when that claim is not only proven false but it is further revealed that authority routinely passes along raw data to governments of other nations, without any legally binding mechanism for enforcement to prevent misuse of the information.

4) The prospects for a “hot” war have been exacerbated by the conduct of the NSA. There is a profound difference between “spying” on other nations by means of conducting information gathering, as opposed to launching a “cyber war” attack.

In a June 25 speech, General Keith Alexander, Commander of the U.S. Cyber Command, cited General Douglas Mac Arthur's Farewell Speech, given at West Point, on May 12, 1962. Therein Alexander in essence stated that the United States is at war, an offensive war, launched employing the same “preemptive war” reasoning used by Japan to justify the attack on Pearl Harbor, by Germany to justify its invasion of Poland, and by George Bush to justify the attack on Iran - the results for all of which history has recorded did not go well for the initiating nations. The behavior of the NSA may certainly be construed by some countries as acts of war. Presidential appointees do not have authority to launch wars on their own initiative, but if we are indeed at war, I believe the Executive Branch has an obligation to inform the public.

Rather important, it is not difficult to imagine that nations against which the NSA has perpetrated such “preemptive cyber war” attacks might well consider retaliation by more violent military means. The public may well approve of war in some cases, but it always has a right to know why its government has willfully put its citizens at risk by initiating a war, cyber or otherwise.

5) Put aside the cost in civil liberties, the waste in financial resources alone that has been, and continues to be, devoted to spying on totally innocent citizens is beyond astounding. And the efficacy is in Bernie Madoff territory.

Judging by congressional testimony on the NSA spying programs, the NSA has been near identically as successful at finding terrorists as was George Bush in finding those nonexistent WMDs in Iraq. Beyond being nothing more than a lottery approach to law enforcement, it increasingly appears to be an outright scam: huge piles of wasted taxpayer dollars serving to benefit only those who run the lottery.

The government displays a monumentally cavalier disregard for expenditure of taxpayer dollars in this secret enterprise. Big money is shoveled to outsourced private sector contractors, whose primary concern, understandably, is with profit over other considerations, since as a private enterprise they are more beholden to their stockholders than to the government. And secrecy has precluded any proper evaluation of cost effectiveness.

And so there has been no substantive cost/benefit ratio analysis of these programs (in terms of program efficacy v both financial expenditure and civil liberties). The public is prevented from knowing when the government does a search, and for what it is searching. And whether the search even yields any actual law enforcement benefit, regardless of the costs in billions of dollars. The only folks who are known to gain from these spying programs are the overly compensated private contractors, who have been gouging the government for their dubious usefulness.

Moreover, the gratuitous self-indulgence of National Security directors who have spent taxpayer funds to hire a Hollywood set designer to craft lavish Star Trek command centers, cannot

realistically be considered by the Executive Branch as a display of well-considered expenditure. (Although it does certainly reveal to the public an instructive insight into the workings of such an individual's mind.)

6) The NSA is pretty much single-handedly destroying the cyber security of American citizens, by diminishing the quality of data protection, and thereby enhancing the prospects for malicious hackers to steal private information. In the effort to perform its desired tasks, the NSA has functionally undermined encryption standards that developers rely upon to build secure products for the public, thereby making the internet less secure, and exposing citizens to increased criminal hacking, foreign espionage, and unlawful surveillance.

And the cost to America's tech industry has been estimated to be lost revenue in the tens of billions of dollars.

This activity is precisely the opposite of operating to protect the interests of our national security.

7) The 4th Amendment is mighty damn explicit. The Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Data mining is a search, by another phrase. Of everybody, all at once. A great big search, a constant-surveillance fishing expedition search for future crimes. The whole basic premise of law enforcement data mining expressly violates the particularity requirements of the 4th Amendment.

Yes, the Supreme Court upheld no-probable-cause DNA collection. And there is a "special needs" doctrine exception to the 4th Amendment (with quite narrowly specified terms for application). But the Supreme Court also has a history with decisions like *Dred Scott*, *Plessy v. Ferguson* and *Bush v. Gore*. They ain't always right. Put all that aside, though, because there has been no Supreme Court test case for the Court to rule upon the legitimacy of the government spying. More to the point, the larger question is, what's the purpose of even having a Constitution if the government can simply pick and choose the occasions for which it will be guided by constitutional authority, and instead merely craft insultingly transparent weasel words to circumvent inconvenient standards?

I respect that law enforcement thinks it must operate without certain constraints. But if the government honestly believes that the needs of national security dictate behavior which violates the 4th Amendment, then the government has an obligation to try and amend the Constitution and change the standards by which the government may legitimately operate. As previously mentioned, insulting The People with abuses of dictionary meaning as a means to justify unconstitutional behavior pretty much establishes a clear foundation for distrusting the government authority.

8) An examination of the NSA's own promulgated rules betrays its operative disingenuity. The plain text of the 702 rule is contradictory. 702 says, "Any inadvertently acquired communication of or concerning a U.S. person must be promptly destroyed if it is neither relevant to the authorized purpose nor evidence of a crime."

702 further declares, "The dissemination of any information about U.S. persons is expressly prohibited unless it is necessary to understand foreign intelligence or assess its importance; is evidence of a crime; or indicates a threat of death or serious bodily harm."

But how does the NSA determine whether it is relevant or constitutes criminal evidence without having first undertaken an evaluation – a search by any other words – of the information after having acquired it, with no warrant? The process of determining whether the "inadvertently acquired" data is or is not "relevant" or "evidence" can only be done by submitting it to analysis - "dissemination" - for "assess(ing) its importance."

How can it be both ways, whereby its "importance" is assessed, while "dissemination" is prohibited? The act of "assess(ing) its importance" is a de facto search - a fishing expedition search for "relevance" - without any predetermined specificity whatsoever in any particular case for which such data might genuinely represent "evidence." Thus what the NSA describes as an "assessment" is a blatant violation of the 4th Amendment.

The plain text of the 4th Amendment is proof of the violations, because only by disingenuous reasoning and abuse of clear dictionary meaning have exceptions been contrived for non-particularized warrants and totally warrantless "data acquisition" searches.

9) "(D)epriving us in many cases, of the benefits of Trial by Jury" is among the usurpations cited by Thomas Jefferson in the Declaration of Independence. In its limited capacity, the FISA Court just hears a one-sided government-only argument, and citizens are deprived of an adversarial proceeding to contest the government authority, thereby effectively recreating one of the reasons we separated from British rule in the first place.

The contempt for the 4th Amendment demonstrated by warrantless dragnet surveillance, the secret laws and interpretations, the flagrant waste of taxpayer money, the reliance on lottery odds and Rorschach analysis, and the insults to the intelligence of the American People from tortured dictionary meaning must be terminated completely.

I thank you for your consideration of my view.

Brian Zick

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"Sprinkle" (alas, photographer unknown)



detail from "Bacchus" by Peter Paul Rubens



Amor